

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

CHARLES BOUGARD

APPELLANT

VS.

CAUSE NO: 2007-CA-00835

MARY BOUGARD

APPELLEE

BRIEF OF APPELLEE, MARY BOUGARD

**ON APPEAL FROM THE CHANCERY COURT
OF MARSHALL COUNTY, MISSISSIPPI**

(ORAL ARGUMENT IS NOT REQUESTED)

SUBMITTED BY:

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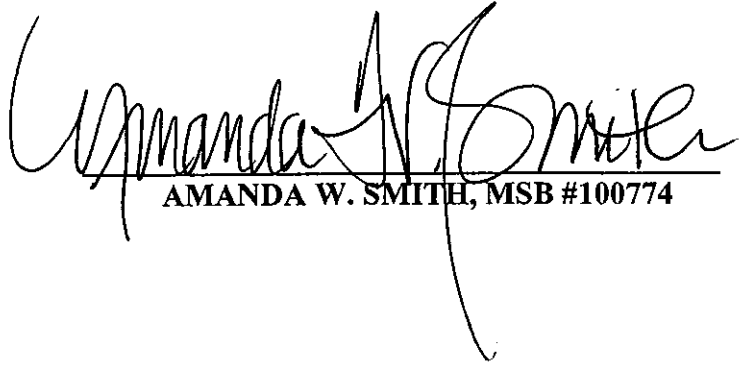
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Honorable Edwin H. Roberts, Jr.
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AMANDA W. SMITH, MSB #100774

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would not be helpful in this case, as it would not aid in offering additional facts, law or argument in support of these issues. The issues before the Court are straightforward issues of law applied to the facts of this case. As such, oral argument would not be of benefit and is not requested.

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STATEMENT OF THE ISSUES

1. The chancellor did hear all evidence relevant to the proceedings.
2. The chancellor did not err in failing to make specific findings of fact and conclusions of law as the parties entered into a settlement agreement prior to a final trial of the matter.
3. The chancellor did not err in seeking to enforce the settlement agreement voluntarily entered into by the parties and recited into the record of the Court's proceedings.
4. The procedures applied in the divorce hearing were consistent with the Mississippi Rules of Civil Procedure and principles of basic due process under the United States Constitution, Sixth Amendment.

STATEMENT OF THE CASE

Mary Bougard seeks affirmation of the approval and entry of the Judgment of Divorce by Chancellor Edwin H. Roberts in the Eighteenth Chancery Court District of Marshall County, Mississippi.

On June 16, 2004 a Complaint for Divorce and Temporary Relief against Charles Bougard was filed in the Chancery Court of Marshall County Mississippi by his wife, Mary Bougard. (R.E. – 000001-6).

Charles Bougard was properly served with process – a Rule 4 Summons and a Rule 81(d) Summons -- on June 17, 2004 wherein he was noticed for a hearing on the Plaintiff's request for temporary relief to take place on July 30, 2004 in Marshall County. (R.E. – 000007-8).

A hearing was conducted on July 30, 2004, as set and noticed, wherein Charles Bougard appeared and represented himself. (R.E. – 000031-33). At the conclusion of the hearing, the Court awarded Plaintiff Mary Bougard various forms of temporary relief. (R.E. – 000009-10).

Subsequent to the July 30, 2004 temporary hearing, Charles Bougard retained counsel, the Honorable Sidney F. Beck, Jr., of the DeSoto County, Mississippi bar.

On September 29, 2004, a Motion for Citation for Contempt requesting relief for Mary Bougard in consideration of Charles Bougard's failure to abide by the Court's temporary order was filed. (R.E. – 000011-13). A hearing on said motion was held on the 16th day of December, 2004. Counsel was present for Charles Bougard and defended him in regard to the contempt allegation. The Court found Charles Bougard to be in

willful and contumacious contempt of the July 30, 2004 Order for Temporary Relief. (R.E. – 000014-16).

Charles Bougard was again found to be in contempt of the Court's July 30, 2004 Order for Temporary Relief on February 15, 2005. (R.E. – 000017-18). On the same date, the Court, upon the approval of the parties and their counsel, entered an Agreed Order for Withdrawal of Grounds and Stipulation to Allow Court to Resolve Property Issues. (R.E. – 000019-20).

An Order of Substitution of Counsel was entered on December 8, 2006 which allowed the Honorable Sidney F. Beck, Jr. to withdraw as counsel for Charles Bougard and allowed the Honorable Karen Tyler to enter an appearance as counsel for Charles Bougard. (R.E. – 000021-22). The matter was ultimately set for April 16, 2007 in the Marshall County Courthouse in Holly Springs for a trial on the disposition of the parties' property. (R.E. – 000023).

On April 16th, 2007, the parties, Mary Bougard and Charles Bougard, and their respective counsels, came before the Court for a trial on the disposition of property. After lengthy and extensive negotiations, the parties' reached a settlement of all property issues pending before the Court. Counsel and the parties went before the Court and announced their settlement agreement. (R.E. – 000072-73). The agreement was read into the record of the Court's proceedings and both parties were questioned by the Court as to whether this reading constituted their agreement. (R.E. -000074-78). The Court advised the parties that this dictated record would be entered the same as if they had signed it on that day. The court then gave ten days within which to prepare a written

version of the agreement, have it properly executed by all parties and counsel, and present it to the Court for approval and entry. (R.E. – 000078-79).

After preparation of the Judgment of Divorce, as instructed by the Court, the same was forwarded to counsel opposite for her and her client to execute. After numerous attempts to get the executed Judgment of Divorce back from counsel opposite, well beyond the exhausted ten day deadline, the Judgment of Divorce was submitted to the Court and the Court approved and entered it without the signature of Mr. Bougard or his attorney, consistent with what the Court's statement of April 16, 2007. (R.E. – 000025-28). A copy of the Judgment of Divorce was provided to counsel opposite. (R.E. - 000024). On May 15, 2007, following this Order for the Chancery Court of Marshall County, Mississippi, Charles Bougard filed his Notice of Appeal.

STANDARD OF REVIEW

In domestic relations matters, it is well established that Chancellors are vested with broad discretion and their findings should not be overturned “unless the chancellor abused his or her discretion, was manifestly in error, or applied an erroneous legal standard.” *Carrow v. Carrow*, 741 So.2d 200, 202 (Miss. 1999). If there is substantial evidence in the record to support the Chancellor’s findings, the reviewing court should not reverse. *Wilbourne v. Wilbourne*, 748 So.2d 184, 186 (Miss.App. 1999).

“The chancellor, as the trier of fact, evaluates the sufficiency of the proof based upon the credibility of the witnesses and the weight of their testimony,” *Fisher v. Fisher*, 771 So.2d 364 (Miss. 2000), and “has the sole authority for determining the credibility of witnesses.” *Yarbrough v. Camphor*, 645 So.2d 867, 869 (Miss. 1994).

SUMMARY OF THE ARGUMENT

The Judgment of Divorce approved and entered by Chancellor Edwin H. Roberts was voluntarily agreed upon by all parties and counsel. Prior to the commencement of the final trial on the morning of April 16, 2007, the parties, with the aid of their counsel, participated in lengthy negotiations for the settlement of property division issues. The parties voluntarily withdrew all grounds for divorce, agreed upon an irreconcilable differences divorce, and stipulated to allow the Court to resolve their property division issues some twenty-six (26) months earlier. A settlement agreement was reached and the same was announced to the Court. Counsel for the parties participated in reciting the settlement terms into the record. The Court questioned each party under oath as to whether the terms as recited were in fact the terms as agreed upon. After hearing affirmation from each party under oath that the terms of the settlement agreement were stated correctly and thereby agreeing that there would be no necessity of a trial, Court was dismissed.

All statutory requirements were met for the entry of a Judgment of Divorce on the Grounds of Irreconcilable Differences. Further, the parties entered into a binding agreement on April 16, 2007 for the conclusion of the divorce cause. For these reasons, the entry of the Judgment of Divorce was proper and warranted under the circumstances.

ARGUMENT AND AUTHORITIES

I. No rights belonging to Charles Bougard were violated as he was given ample time to retain the services of an attorney and had the financial wherewithal to do so.

In his brief, Charles Bougard alleges his failure to obtain legal representation violates his Sixth Amendment right to counsel since the matter was “quasi-criminal.”

Mississippi Rule of Civil Procedure 81(d)(2) provides:

The following actions and matters shall be triable 7 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to wit: removal of disabilities of minority, temporary relief in divorce, separate maintenance, child custody, or child support matters; modification or enforcement of custody, support, and alimony judgments; contempt; and estate matters and ward's business in which notice is required but the time for notice is not prescribed by statute or by subparagraph (1) above.

Temporary hearings are specifically triable 7 days after completion of service of process in any manner other than publication. M.R.C.P. 81(d). Charles Bougard was properly served with a Rule 81(d) Summons on June 17, 2004, giving him notice of a hearing on the temporary features set for July 30, 2004. (R.E. – 000007-8). Charles Bougard was given excessively more time than that which is required to obtain counsel and prepare for the noticed temporary hearing. He was given forty-three (43) days notice of same. (R.E. – 00007-8).

Further, on July 30, 2004, the date of the scheduled temporary hearing, Charles Bougard informed the Court that he was able to obtain counsel. (R.E. – 000032). Having noted that Charles Bougard was personally served with process and thereby noticed for the scheduled temporary hearing, the Court proceeded with the hearing. (R.E. – 000031-

33). Finally, Charles Bougard offered testimony on that same date that his income for the previous year was \$51,648.51. (R.E. - 000053).

The failure on the part of Charles Bougard to not obtain counsel for the hearing he was provided more than adequate notice of is not violative of his Sixth Amendment Rights. *Carter v. State*, 941 So.2d 846 at 852 (Miss.App., 2006) (where a criminal defendant was not denied his Sixth Amendment right to representation after the presiding judge informed him of what was expected of him and that no leniency would be applied because of self-representation).

Charles Bougard also references *Mississippi Rule of Civil Procedure* 60 as the presiding light to cure the “inequities” he has suffered. Under *Mississippi Rule of Civil Procedure* 60(b)(6) “the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.” This appeal is not the proper place for such a procedure. Instead, action should be instituted under the original cause number and heard before the court of the original action.

Charles Bougard had not only ample time but also the sufficient financial ability in which to obtain counsel for the July 30, 2004 temporary hearing. Further, the denial of Charles Bougard’s rights, if any, is not reversible error as he obtained legal counsel, submitted an Answer to the action, and was represented further in the proceedings by an attorney. The findings of the Court on the date of the temporary hearing were just that – temporary. All features addressed by the Court on a temporary basis could be brought before the Court again at a final hearing of the matter.

II. The temporary hearing was conducted properly based upon the evidence before the Court.

On or about July 30, 2004 during the hearing on the temporary features of Mary Bougard's Complaint for Divorce, evidence was entered into the record in the form of a Disclosure Statement, Note and Security Agreement evidencing Charles Bougard's signature along with Mary Bougard's signature on the mortgage with Citifinancial. (R.E. – 000082-94). Charles Bougard did not object to said document being admitted into evidence. (R.E. – 000037-38). The only evidence before the Court for purposes of rendering a decision after a temporary hearing was a Disclosure Statement, Note and Security Agreement which purported to bear both parties' signatures and Charles Bougard's oral testimony denying signature of same. (R.E. – 000058).

The Chancellor, as the trier of fact, evaluates the sufficiency of the proof based upon the credibility of the witnesses and the weight of their testimony. *Fisher v. Fisher*, 771 So. 2d 364 (Miss. 2000). The Court rendered a decision for temporary relief based upon the evidence before it. (R.E. – 00009-10). Again, the finding of the Court constituted that of a temporary one. Any further presentation of evidence in contradiction of the Court's finding was reserved for a final trial of the matter.

The Courts have long held that a decision will not be reversed "unless the chancellor abused his or her discretion, was manifestly in error, or applied an erroneous legal standard." *Carrow v. Carrow*, 741 So.2d 200, 202 (Miss. 1999). If there is substantial evidence in the record to support the Chancellor's findings, the reviewing court should not reverse. *Wilbourne v. Wilbourne*, 748 So.2d 184, 186 (Miss.App. 1999).

Again, after conducting a hearing and hearing evidence from both parties, the Court rendered a decision based upon the evidence before it. The Court's actions, in no way, constituted an abuse of discretion.

III. The parties voluntarily entered into a binding settlement agreement, thereby negating the need for any analysis or award by the Court.

Statute mandates that no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial unless the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the Court. M.C.A. § 93-5-2 (5). Further, if the parties consent to a divorce on the ground of irreconcilable differences but wish to permit the Court to resolve issues concerning the division of property rights between them because they cannot agree upon adequate provisions, the consent to adjudicate must contain the following necessary language: (1) "the parties voluntarily consent to permit the court to decide such issues," and (2) "that the parties understand that the decision of the court shall be a binding and lawful judgment". M.C.A. § 93-5-2 (3).

On or about February 15, 2005, the parties executed and the Court approved and entered an Agreed Order for Withdrawal of Grounds and Stipulation to Allow Court to Resolve Property Issues. (R.E. 000019-20). Accordingly, the parties thereby consented to a divorce on the grounds of irreconcilable differences and any and all contest the parties had to the divorce were withdrawn. Further, the parties' consent to adjudicate included the required magic language. (R.E. 000019-20).

On the scheduled trial date, April 16, 2007, after lengthy settlement negotiations, and prior to the commencement of the trial, counsel for the parties announced that a settlement had been reached by the parties. (R.E. – 000072-73). At no time was Charles

Bougard threatened with incarceration and at all times during this meeting he was represented by counsel. Further, the only time in which Charles Bougard was addressed by the Court was during the time in which the terms of the settlement agreement were being recited into the record. (R.E. – 000071-79). The settlement agreement was read into the record of the Court’s proceedings and both parties were questioned by the Court as to whether what was read into the record did, in fact, constitute the terms of their settlement agreement. (R.E. – 000077-78). No testimony as to anything other than the fact that the parties had reached a settlement agreement was ever taken. (R.E. – 000071-81). Accordingly, there was never any evidence before the Court whereby it could have made any analysis whatsoever. On the contrary, a settlement agreement had been reached between the parties.

In *Samples v. Davis*, 904 So.2d 1061, 1065(Miss.2004), this Court held that “the circumstances of announcing in open court the settlement of the dispute that is the purpose of the hearing, with a recital of the terms of the settlement into the record, followed by an agreement to end the hearing, reflects an intention to be bound at that time.” The Appellant, however, cites the case of *Heatherly v. Heatherly*, 914 So.2d 754 (Miss. App. 2005) for the principal that where there is an indication of disagreement with an Order, even if it has been read into the record, the parties cannot be bound. The *Heatherly* Court makes no such finding. In fact, the *Heatherly* Court asserted that the only reason for which the above referenced *Samples* principle was not followed was due to the fact that other steps pursuant to Mississippi law to perfect an irreconcilable differences divorce were not properly taken. *Id* at 758. More specifically, in *Heatherly*, one of the parties had not withdrawn her contest to the divorce. *Id* at 758.

As previously stated, in contrast to the parties in *Heatherly*, both parties involved in the case *sub judice* had withdrawn their contest to the divorce on February 15, 2005. (R.E. – 000019-20). Further, in contrast to the circumstances presented in *Engel v. Engel*, 920 So.2d 754 (Miss.App.2006), all statutory mandates for the procurement of a divorce on the grounds of irreconcilable differences were adhered to. The parties in the case *sub judice* announced in open court the settlement of the dispute that was the purpose of the hearing, made a recital of the terms of the settlement into the record, and followed with an agreement to end the hearing. (R.E. – 000072-79). It was clearly the intention of the parties to be bound by this agreement and pursuant to *Samples*, the Court should find that the parties were accordingly bound at that time.

CONCLUSION

The Chancery Court's decision to accept and enter into the record the agreement for settlement of property rights and divorce was proper and in accordance with the Statute and the facts of the present case.


Contrary to the Appellant's arguments, the chancellor properly accepted the settlement agreement. The chancellor properly allowed entry of the agreement into the record and informed the parties that it would be binding. Mr. Bougard was at no point threatened with incarceration in order to secure his agreement to the settlement terms. The trial of this cause never commenced due to the announcement that the parties had reached an agreement for settlement. Therefore, the Court was never afforded the opportunity to hear evidence or make findings of fact or conclusions of law. In response to the allegation that "the chancellor erred in failing to make specific findings of fact regarding the fraud and overreaching tactics of the Plaintiff/Appellee/Wife in acquiring a mortgage loan in Charles Bougard's name," this matter would be reserved for trial. Since the parties settled prior to trial, the chancellor was not afforded the opportunity to make specific findings of fact on this issue, nor was it even necessary for the Chancellor to make such findings because the matter was settled.

For the reasons given above, the decision of the Chancery Court of Marshall County, Mississippi, should be affirmed in its entirety.

RESPECTFULLY SUBMITTED, this the 20th day of November, 2007

MARY BOUGARD, Appellee

By: 

HON. AMANDA W. SMITH (MSB: )

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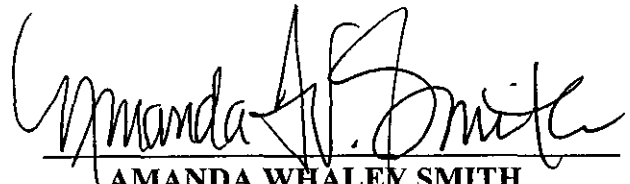
CERTIFICATE OF SERVICE

This will certify that I, the undersigned attorney for Smith Whaley, PLLC, have this date delivered a true and correct copy of the above and foregoing *Brief of Appellee, Mary Bougard*, to all counsel of record by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

Honorable Edwin H. Roberts, Jr.
Chancellor
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Telephone: (901) 276-0392

THIS, the 25th day of November, 2007.



AMANDA WHALEY SMITH

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

CHARLES BOUGARD

APPELLANT

VS.

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APPELLEE

RECORD EXCERPTS SUBMITTED BY APPELLEE, MARY BOUGARD

**ON APPEAL FROM THE CHANCERY COURT
OF MARSHALL COUNTY, MISSISSIPPI**

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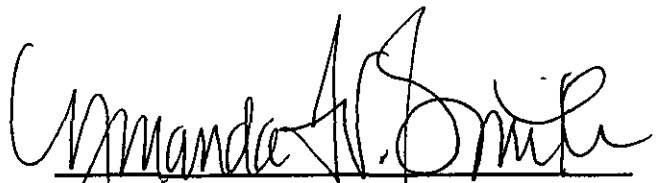
CERTIFICATE OF SERVICE

This will certify that I, the undersigned attorney for Smith Whaley, PLLC, have this date delivered a true and correct copy of the above and foregoing *Record Excerpts of Appellee, Mary Bougard*, to all counsel of record by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

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THIS, the 20th day of November 2007.



AMANDA WHALEY SMITH

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